Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
The Development of a National Framework to	)	RM 9474
Detect and Deter Backsliding to Ensure	)	
Continued Bell Operating Company Compliance	)	
with Section 271 of the Communications Act	)	
Once In-region InterLATA Relief Is Obtained	)	

REPLY COMMENTS OF
ALLEGIANCE TELECOM, INC.

Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW
Fifth Floor
Washington, DC 20036
Tel: (202) 955-9600
Fax: (202) 955-9792

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SUMMARY

In its February 1, 1999 Petition for Expedited Rulemaking, Allegiance Telecom, Inc. ("Allegiance") put forward a series of specific actions for the Commission to consider in order to ensure that the growth of competition envisioned by Congress continues even after Bell operating companies ("BOC") obtain interLATA relief pursuant to section 271 of the Act. Specifically, the Allegiance Petition proposes:

1. A set of verifiable minimum performance standards to ensure that BOCs continue to provide each element of the Competitive Checklist to competitors;

2. An expedited complaint procedure that includes a consultative role for the Department of Justice to handle section 271-related complaints; and

3. A three-tiered system of self-executing remedies that are triggered by a finding by the Commission that a BOC has fallen out of compliance with its section 271 obligations.

Through the steps outlined in its Petition, the Commission would go a long way toward increasing regulatory certainty and establishing workable procedures for ensuring BOC compliance with the procompetitive provisions of the Act – even after such time as interLATA relief is obtained.

Appreciative of the need for affirmative action by the Commission to establish ongoing compliance mechanisms, comments of the competitive community largely applaud Allegiance's effort. In sharp contrast, however, BOC comments fail to recognize the Allegiance Petition as a source of regulatory certainty, and instead view the Petition with suspicion and even go so far as to suggest that the Commission lacks the authority to adopt the performance metrics, complaint procedures, and remedies proposed by the Allegiance.

In response, Allegiance submits that the comments filed by competitors and BOCs alike make it clear that a national framework of default performance metrics, complaint procedures, and remedies is necessary to measure ongoing section 271 compliance. While the BOCs recommend a piecemeal approach to performance measurement, Allegiance notes that the Competitive Checklist outlines a list of comprehensive standards, and thus a comprehensive set of performance standards – tied to the Checklist – are needed to ensure ongoing compliance with section 271. Similarly, the practical importance of ensuring continued section 271 compliance as well as the plain language of the Act suggest that the Commission should establish a distinct complaint procedure to address section 271 related issues, rather than use combined dockets, as suggested by the BOCs. Finally, upon a finding of fault, self-executing remedies – such as Allegiance three-tiered remedy proposal – are necessary to encourage BOCs to remain in compliance with section 271 after interLATA relief is obtained.

In sum, the comments filed underscore the importance of the actions recommended in the Allegiance Petition, and therefore Allegiance respectfully requests that the Commission convene a rulemaking proceeding to address ongoing BOC compliance with section 271 of the Act after in-region interLATA relief is obtained.

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Allegiance Telecom, Inc. ("Allegiance"), by its counsel, hereby submits its reply comments to those filed by various parties in response to Allegiance's February 1, 1999 Petition for Expedited Rulemaking ("Petition").

I. Introduction

In an effort to provide regulatory certainty and to ensure the success of the procompetitive provisions of the Communications Act ("Act"), Allegiance, in its Petition, outlined specific proposals for Commission action to measure and to encourage ongoing Bell operating company ("BOC") compliance with the Act once a BOC obtains in-region interLATA relief. Section 271 of the Act places obligations on BOCs that continue even after section 271 relief is obtained, and regulatory certainty requires that the Commission develop a simple, national framework to make the "rules of the road" of continued compliance clear to BOCs, competitors, and regulators.

Recognizing the need for affirmative action and the establishment of ongoing compliance mechanisms, competitive local exchange carriers ("CLEC") largely applaud Allegiance's Petition.[1] The BOCs, by contrast, fail to acknowledge the Allegiance Petition as an effort to develop a roadmap for ongoing compliance with the Act, and instead claim that the Allegiance Petition in some way attempts rewrite the Act.[2] In response to concerns lodged by the BOCs, Allegiance maintains that the (1) default performance standards, (2) complaint procedures, and (3) enforcement remedies proposed in its Petition are consistent with section 271 and necessary to the ultimate success of the Act as envisioned by Congress.

II. The Need for a Comprehensive National Framework Is Clear

To promote regulatory certainty, the Allegiance Petition supports clear, comprehensive, and verifiable default performance metrics as part of its proposed national framework to ensure BOC compliance with section 271 after interLATA relief is obtained.[3] By

1 *See e.g.*, Time Warner at 1 ("Section 271 can only serve its purpose as a mechanism for lowering the barriers to entry into the local market if (1) the FCC establishes clear performance measures … and (2) the FCC adopts effective rules for post-Section 271 approval enforcement.") Allegiance notes that some competitors feel that that Allegiance's Petition does not go far enough. For example, MCI WorldCom notes that "most of the suggestions for enforcement proposals made by Allegiance need not be limited to section 271 and should also be applied to encourage ILEC compliance with section 251." MCI WorldCom at 21. While its Petition focuses on ongoing compliance with section 271 after obtaining interLATA relief, Allegiance notes that it in no way disagrees with the concerns of MCI WorldCom and others.

2 *See e.g.*, Bell Atlantic at 1-2.

3 Allegiance Petition at 11.

adopting verifiable performance metrics tied to the Competitive Checklist, the standards for continued section 271 compliance would be clearly articulated, adding clarity to ongoing BOC statutory obligations. As WinStar notes, "interLATA approval is not crossing a finish-line but meeting a threshold," and "[o]nce a BOC crosses this threshold, the Commission must be prepared to assure continued compliance with the Competitive Checklist."[4] In recognition of the fact that section 271 places ongoing obligations on BOCs, the Commission should establish a comprehensive national framework of default performance metrics to supplement, but not disrupt, work done by the State commissions.

A. A National Framework of Default Performance Metrics is Necessary to Measure Ongoing Section 271 Compliance

While the BOCs uniformly oppose the establishment of a national framework of default performance metrics, their comments demonstrate why clearly defined performance standards are critical to ensuring ongoing section 271 compliance. For example, Bell Atlantic claims that it provisioned approximately 90% of resale orders in five business days or less during the fourth quarter of 1998.[5] Bell Atlantic next notes that the average interval for combined resale and unbundled element orders was under five days in New York over the same time period.[6]

Even assuming, *arguendo*, the accuracy Bell Atlantic's figures on their face, the data as presented obscures – intentionally or unintentionally – important performance information. For example, in claiming that it provisioned 90% of resale orders within five days,

4 WinStar at 6.

5 *Id.* at 9.

6 *Id.*

Bell Atlantic fails to indicate whether that level is for a particular state or the region as a whole. This is especially important in the Bell Atlantic territory, where Bell Atlantic has different interface arrangements and business rules in place in its North and South territories. If a region-wide figure is used, statistics from a large State like New York – where the State commission has placed extreme pressure on Bell Atlantic to improve its OSS – could obscure poorer performance in Bell Atlantic South States, where State commissions have been less pro-active in their efforts and less successful in persuading Bell Atlantic to improve its performance.

Additionally, Bell Atlantic presents combined resale and UNE data for New York, which obfuscates data related to facilities-based carriers. The reader is presented with no information on the relative numbers of resale and UNE orders provisioned in New York, and it may very well be the case that the number of comparatively simple resale orders dwarfs the number of more complex UNE orders. Even if the "average" order is provisioned within five business days – which Allegiance has not experienced – that still means that approximately half of all orders take longer than five days to provision. Clearly then, performance data may be easily manipulated – especially when the BOCs are self reporting.

Of course, Allegiance and other CLECs cannot assume the accuracy of BOC figures given BOC performance to date. As MCI WorldCom explains in detail, KPMG Peat Marwick "could not duplicate Bell Atlantic's performance reports" in New York, and "a review of the New York documentation revealed stark discrepancies between the way CLECs expected performance measurements would be defined and conducted and the way in which Bell Atlantic defined and conducted its measurements."[7] MCI WorldCom goes on to note similar problems in

7 MCI WorldCom at 8.

Texas.[8] At bottom, the point is clear: a national framework of well-defined and well-understood performance metrics is critical to evaluate ongoing BOC compliance with the Competitive Checklist.

B. The Performance Measures Recommended by Allegiance Enhance, and in No Way Disrupt, Work Done by State Commissions

In spite of BOC claims to the contrary, the performance metrics proposed in the Allegiance Petition would in no way disrupt existing state performance standards.[9] Rather, the national framework proposed by Allegiance would fill any gaps in State performance metrics and serve as default standards in cases where a State has not yet adopted performance standards. As MCI WorldCom notes, "[a]doption of a basic set of nationwide performance requirements is vital, for many states have not adopted performance requirements at all, or have chosen to rely on inadequate requirements."[10] Thus, as envisioned by the Allegiance Petition, a national framework of performance metrics would enhance – not disrupt – efforts by State commissions.

Bell Atlantic further alleges that national performance standards would be "meaningless if applied to the different systems and practices of another carrier."[11] This

8 *Id.* at 9.

9 *See, e.g.*, Bell Atlantic at 4 n.5.

10 MCI WorldCom at 7.

11 Bell Atlantic at 5 n.6.

statement fails to recognize that, as noted above, the national framework supported by Allegiance would serve as default standards to fill gaps that may exist at the State-level. For example, while many States have adopted operations support system standards ("OSS"), far fewer have adopted performance standards for other Competitive Checklist items, such as access to poles, ducts, conduits, and rights of way.[12] Measuring comprehensive compliance with the Competitive Checklist requires the establishment of performance metrics for all Checklist items, and not only those associated with OSS.

C. The Commission Should Address Ongoing Section 271 Compliance in a Comprehensive Proceeding, Rather Than in a Piecemeal Approach as Suggested by the BOCs

The BOCs consistently allege that the Allegiance Petition ignores the work done by the Commission its *Performance Measures* proceeding and other proceedings.[13] This is entirely untrue. The Allegiance Petition traces the history of the Commission's performance metric effort from its August 8, 1996 statement setting January 1, 1997 as the BOC and ILEC deadline for providing parity of access to OSS to LCI's May 30, 1997 Petition for Rulemaking for the establishment of OSS standards to the Commission's April 17, 1998 Notice of Proposed Rulemaking, which responded to the LCI Petition.[14] Indeed, tracing this history demonstrates that nearly three years of effort have yet to yield affirmative results, underscoring the need for

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12 47 U.S.C. § 271(c)(2)(B)(iii).

13 Ameritech at 2-4; Bell Atlantic at 5; BellSouth at 3.

14 Allegiance Petition at 18-20 (citations omitted).

the Commission to take prompt and comprehensive action to develop a national framework for ensuring section 271 compliance.

In contrast to the piecemeal approach that the BOCs support, Allegiance seeks to develop a comprehensive framework of performance standards, complaint procedures, and remedies tied to section 271 and its Competitive Checklist. In its evaluation of section 271 applications, the Commission applies each element of the Competitive Checklist to the facts presented, and Allegiance submits that clear, verifiable, and comprehensive standards are critical to ongoing compliance. As Chairman Kennard has noted, "[o]nly by making our performance monitoring standards clear, and by ensuring swift and certain punishment in a degree that will deter misconduct, can we hope to guarantee that markets that are once opened to competition will remain open to competition."[15] Thus, a clear set of performance standards – tied to the Checklist – are needed to ensure the ultimate success of the Act.

III. A Specific Section 271 Complaint Procedure Is Appropriate and Necessary to Prompt Resolution of Ongoing Section 271-Related Disputes

In its Petition, Allegiance recommends that the Commission establish an expedited section 271 complaint procedure that is (1) separate from other Commission complaint fora (*e.g.*, the standard section 208 docket or the newly-created Accelerated Docket) and (2) permits a consultative role for the Department of Justice ("DOJ"). The BOCs flatly reject these proposals, and rather than present an affirmative vision of how a section 271 complaint

15 Statement of Chairman William E. Kennard, The Telecommunications Act of 1996 – Moving Toward Competition Under Section 271 (Mar. 4, 1998).

proceeding might be designed, the BOCs merely suggest that section 271 complaints should be lumped in with the Commission's existing complaint dockets.[16] The BOC position ignores the express language of the Act, which directs the Commission to establish a section 271 complaint procedure, and the important role that Congress has given the DOJ in evaluating and monitoring BOC compliance with section 271.

A. The Act Directs the Commission to Establish a Section 271 Complaint Procedure

Section 271(d)(6)(B) of the Act provides that the Commission "shall establish procedures for the review of complaints concerning the failures by Bell operating companies to meet conditions required by [section 271]."[17] While Ameritech submits that the Commission's Rule 1.736, which states that the Commission will resolve 271-related complaints within 90 days, satisfies Congress' directive,[18] Allegiance maintains that the express language of the statute mandates that the Commission establish a separate and distinct section 271 complaint docket.

SBC asserts that establishing a 271 complaint procedure is unnecessary, and that the Commission's existing "Accelerated Docket" should be sufficient to handle section 271 related complaints.[19] Although Allegiance supports the Commission's Accelerated Docket, the importance of ensuring ongoing section 271 compliance requires "[t]he swift resolution of backsliding complaints ... through the establishment of a separate, accelerated processing

16 Ameritech at 4; SBC at 5-6.

17 47 U.S.C. § 271(d)(6)(B).

18 Ameritech at 5.

19 SBC at 5.

track."[20] As indicated by Hyperion, "[i]n light of the short time frame in which [271] disputes are to be resolved, and the likely severity of such disputes, the Commission and the industry would likely be well served by establishing a dispute resolution process now rather than waiting until a complaint is pending."[21] Thus, the plain language of the Act as well as the practical importance of ensuring continued section 271 compliance militate in favor of a separate section 271 complaint procedure, as called for in the Allegiance Petition.

B. The Act in No Way Precludes a DOJ Role in Section 271 Related Complaints

The BOCs also attack Allegiance's suggestion that the Commission establish a voluntary, ongoing role for continued DOJ involvement in the section 271 process. Bell Atlantic, for example, states that "[t]he Commission should reject Allegiance's request to create a role for the Department of Justice in the complaint process," noting only that DOJ may "intervene in a complaint where it has the appropriate interest."[22] In Allegiance's view, the BOC position belittles DOJ's role in the section 271 process, despite Congress' express direction that DOJ be given an important role in the section 271 process.

There is simply nothing in the Act that limits the ability of the Commission to carve out an ongoing DOJ advisory role, and Allegiance submits that DOJ could be a valuable resource in section 271 enforcement matters. As Allegiance noted in its Petition, DOJ has developed substantial expertise in telecommunications matters in its role as an evaluator of

[20] CoreComm at 7.

[21] Hyperion at 5.

[22] Bell Atlantic at 6 n.10.

section 271 application. DOJ's telecommunications experience and its expertise in the area of antitrust law potentially make DOJ a valuable resource to the Commission in its ongoing section 271 enforcement efforts. Therefore, Allegiance maintains that continued DOJ involvement in the post-271 approval environment would aid the Commission and benefit BOCs and CLECs alike.

IV. Clearly Defined, Self-Executing Section 271 Remedies Are Necessary to Deter Backsliding

Commenting CLECs make clear the need for the establishment of a self-executing system of remedies, such as Allegiance's three-tiered remedy structure. As MCI WorldCom properly points out, "[l]awsuits and complaint proceeding can take months or years before a final conclusion is reached."[23] Under the Allegiance approach, however, upon a finding of fault through the 90-day 271 complaint procedure, remedies "ratchet up" every 60 days until a BOC comes into compliance. This puts the burden on the offending BOC, rather than on the CLEC, to comply.

As is true throughout their comments, the BOCs make no effort to suggest alternatives remedies that the Commission should consider. Instead, the BOCs proffer their tired argument supporting state-by-state, piecemeal remedies available through "negotiated" agreements.[24] The BOC approach ignores the express language of the Act, which permits the

23 MCI WorldCom at 17.

24 Ameritech at 6; Bell Atlantic at 2; SBC at 6-7;

Commission to assess monetary penalties on the BOCs for noncompliance, or even suspend or revoke in-region interLATA authorization.[25]

Regarding monetary penalties, the Act specifically provides that the Commission, after notice and opportunity for hearing, may "impose a penalty on [BOCs who cease to be in compliance with its 271 obligations] pursuant to title V."[26] Pursuant to Title V of the Act, the Commission is authorized to impose upon common carriers who willfully or repeatedly fail to comply with the terms of their Commission authorization, or any provision of the Act, fines of "up to up to $100,000, for each violation or each day of a continuing violation" of the Act, up to $1,000,000 for any single violation of the Act.[27] Thus, pursuant to title V, the Commission has authority to assess financial penalties on BOCs in the form of both price reductions for UNEs (Tier 1 penalty) and material fines (Tier 3 penalty).

The Commission has routinely exercised this authority to exact huge monetary penalties against common carriers who are in violation of the Act and the Commission's rules. The following examples are illustrative:

(1) In 1993, the FCC issued a forfeiture against AT&T in the amount of $464,000 for offering enhanced services and abbreviated dialing access to its enhanced services without obtaining the required Commission waiver[28];

[25] 47 U.S.C. § 271(d)(6)(A).

[26] *See* 47 U.S.C. § 271(d)(6)(A)(ii).

[27] *See* 47 U.S.C. §503(b)(2)(B).

[28] *In the Matter of American Telephone & Telegraph Company*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 6804 (1993).

(2) In 1998, the FCC issued a forfeiture against All American Telephone Company, Inc. in the amount of $1,040,000 for 13 instances of slamming ($80,000 for each violation)[29];

(3) In 1998, the FCC issued a forfeiture against Ameri-I-Net Services Corp. in the amount of $1.36 million for 16 instances of forged letters of agency ($80,000 for each violation) and for 2 instances of slamming ($40,000 for each violation)[30]; and

(4) In 1998, the FCC issued a forfeiture against Business Discount Plan, Inc. in the amount of $2.4 million for 30 instances of slamming ($40,000 for each violation) and 30 instances of unfair and unreasonable telemarketing practices ($40,000 for each violation).[31]

The Commission's (and the Congress') establishment of a strong public policy against slamming, combined with the nature, circumstances, extent, and gravity of the violations allowed the Commission to take actions that would clearly deter such behavior. Similarly, the strong public policy favoring fair and unfettered competition in the telecommunications marketplace, as required by the Act, militates strongly in favor of the Commission exercising its broad authority under section 271(d)(6)(A)(ii) and title V of the Act to implement the price reductions (Tier 1) and the material fines (Tier 3) proposed by Allegiance.

At bottom, the authority granted the Commission in the Act enables the Commission to assess penalties that are material enough to deter anti-competitive behavior. As

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[29] *In the Matter of All American Telephone Company, Inc.*, Apparent Liability for Forfeiture, 13 FCC Rcd 15040 (1998).

[30] *In the Matter of Ameri-I-Net Services Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 22055 (1998).

[31] *In the Matter of Business Discount Plan, Inc.*, Notice of Apparent Liability for Forfeiture, PP13-15, ENF-98-02, NAL/Acct. No. 916EF0004, FCC 98-332 (rel. Dec. 17, 1998), *amended by* Erratum (rel. Dec. 30, 1998).

noted by ALTS, Focal and KMC, "penalties must be substantial so that BOCs cannot readily absorb them as a mere cost of doing business,"[32] and Allegiance submits that the price reductions and material fines called for in its three-tiered penalty structure will serve to encourage ongoing BOC compliance with the Competitive Checklist after in-region interLATA relief is obtained.

V. CONCLUSION

For the foregoing reasons, Allegiance submits that the actions that it seeks are of great importance to the growth of competition and therefore respectfully requests that the Commission convene a rulemaking proceeding consistent with Allegiance's February 1, 1999 Petition as soon as practicable.

Respectfully submitted,

By: Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW
Fifth Floor
Washington, DC 20036
Tel: (202) 955-9600
Fax: (202) 955-9792

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[32] ALTS, Focal, and KMC at 9-10.